Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link Up	)	WC Docket No. 03-109
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	
Numbering Resource Optimization	)	CC Docket No. 99-200

REPLY COMMENTS OF THE NATIONAL EXCHANGE CARRIER ASSOCIATION, INC.

December 22, 2008

TABLE OF CONTENTS

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link Up	)	WC Docket No. 03-109
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	
Numbering Resource Optimization	)	CC Docket No. 99-200

REPLY COMMENTS OF THE
NATIONAL EXCHANGE CARRIER ASSOCIATION, Inc.

I. INTRODUCTION AND SUMMARY

Comments submitted in the above-captioned proceeding[1] show substantial support for prompt Commission action on the "growing consensus" items outlined in the

[1] *High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Lifeline and Link Up*, WC Docket No. 03-109, *Universal Service Contribution Methodology*, WC Docket No. 06-122, *Numbering Resource Optimization*, CC Docket No. 99-200, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, *IP-Enabled Services*, WC Docket No. 04-36, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-

Joint Statement of Commissioners Copps, Adelstein, Tate and McDowell.[2] Most commenters agree, however, adoption of other proposals described in Appendices to the *Further Notice* – in particular, mandatory broadband build-out commitments, reverse auctions, study area-specific caps or freezes on universal service support, imposition of a new "additional cost" standard for interconnection pricing, mandatory state-wide uniform interconnection rates, or classification of all IP/PSTN services as "information services" – would lead to regulatory chaos rather than reform.

Indeed, commenters have identified so many legal, regulatory, technical and practical problems with respect to these proposals it is difficult even to catalog them all, let alone explain and comment on their details. But the overall message to the Commission is clear: Attempts to resolve all intercarrier compensation (ICC) and Universal Service Fund (USF) reform issues in one fell swoop, as the *Further Notice* proposes, will leave the Commission and the industry tied up in legal knots for years and stall, rather than advance, progress towards reform and universal broadband deployment.

The record shows the Commission should instead take more reasonable, measured steps towards ICC and USF reform, as described in the *Joint Statement*. The end result will be faster, not slower, achievement of legally-sustainable ICC reform and our nation's broadband deployment goals.

---

262 (rel. Nov. 5, 2008) (*Further Notice*).

[2] *Further Notice*, Joint Statement of Commissioners Michael J. Copps, Jonathan S. Adelstein, Deborah Taylor Tate and Robert M. McDowell (*Joint Statement).*

II. THE COMMISSION SHOULD ADOPT ONLY REASONABLE MEASURES TOWARDS COMPREHENSIVE INTERCARRIER COMPENSATION REFORM.

In comments, NECA strongly suggested the Commission take prompt action on the "growing consensus" items mentioned in the *Joint Statement,* and refer consideration of more complex issues to later proceedings. Rather than attempt to impose controversial and draconian new ICC rules intended to solve problems with yesterday's circuit switched networks, for example, NECA believes the Commission should take certain key steps now and institute more targeted proceedings to develop interconnection, cost recovery and pricing rules reflecting characteristics of the multi-service, all-packet broadband networks currently being deployed by rural companies.[3]

Specifically, as a critical first step towards comprehensive ICC reform, the Commission should promptly adopt rules permitting rural rate-of-return (RoR) carriers to move their intrastate originating and terminating access rates to capped interstate levels, using a restructure mechanism that maintains interstate switched access cost recovery and provides for intrastate revenue recovery. Permitting carriers and state commissions to reduce intrastate access rates to interstate levels on a voluntary basis would eliminate a major source of rate arbitrage, while avoiding legal issues likely to arise with any attempt by the Commission to preempt state regulation of intrastate access charges, or to force carriers to adopt a single uniform rate based on a new, untested additional costs standard. The Commission should also promptly adopt rules governing call signaling and financial responsibility for unlabeled traffic, as proposed in the *Further Notice,* and confirm

[3] NECA Comments, CC Docket No. 01-92 (Nov. 26, 2008), at 2-3. *See also,* Rural Iowa Independent Telephone Association (RIITA), at 7; Rural Telecommunications Group (RTG) at 2; NTCA at 7; Rural ETCs in Arkansas (RATS), at 5; Windstream at 23-24; CenturyTel at 9-10; Washington Utilities and Transportation Commission at 5-6.

interconnected Voice over Internet Protocol (VoIP) services are subject to the same intercarrier compensation obligations as the traditional telephony services with which they directly compete.

With respect to Universal Service reform measures, NECA likewise recommends immediate adoption of urgently-needed steps (*e.g.*, elimination of the "identical support" rule), and more careful study of how USF support can more effectively target broadband deployment in an "all packet" network environment.

Numerous commenters agree with this incremental approach, pointing out in various ways the Commission "need not resolve all aspects of Intercarrier Compensation and Universal Service reform in a single order."[4] Instead, as the Massachusetts DTC suggests, the Commission should

> continue with its collaborative reform approach – first, to take the time to meaningfully review the initial and reply comments submitted over the next two weeks, second, to initiate its own substantive cost studies, data gathering, and data analyses in order to better substantiate any future reforms, including estimating the financial impact of its proposals; and third, draft a final comprehensive reform proposal that would benefit consumers and not unfairly favor one segment of the industry.[5]

Rural entities echo this concern. The Rural Telecommunications Group (RTG) suggests, for example, the Commission "take the time necessary to digest industry comments" on the proposals attached to the *Further Notice.*[6] Given the last-minute nature of the proposed new rules, and their questionable legal foundation, RTG states, a hasty decision on such major universal service and intercarrier compensation issues is "a risk that the FCC should not take and a paradigm shift that the rural telecommunications

[4] Broadview Networks at 4; *See also* PA PUC at 2; PacWest et al, at 2; Citynet et al, at 28-29.

[5] Mass. DTC (MDTC) at 2-3. *See also* Nebraska PSC at 5 ("[G]iven the magnitude and complexity of the issues the Commission should move slowly and cautiously.")

[6] RTG at 2.

industry, given the current state of the United States' economy, may be unable to survive."[7] Similar observations were made by the Rural Iowa Independent Telephone Association (RIITA)[8], Public Service Telephone,[9] and numerous other commenters.

Parties arguing for an immediate decision governing comprehensive reform of all ICC mechanisms[10] appear primarily interested in a specific result – namely, rapid transition to a regime specifying uniform, near-zero rates for all calls. But the overwhelming weight of comments demonstrates a more cautious approach is not only warranted as a matter of good administrative practice, but will be less likely to be overturned on review, and therefore ultimately represents the faster path to comprehensive ICC reform.

For example, the Commission's proposal to place all ICC mechanisms under section 251(b)(5)'s reciprocal compensation structure appears to be subject to strong challenge on jurisdictional grounds. Comments filed by NARUC, as well as various state regulatory agencies, argue strongly the Commission's proposal impermissibly intrudes on the authority reserved to the states under section 2(b) of the Act.[11] Citynet pointed to the Supreme Court's decision in *Iowa Utils. Bd. v. FCC*, which characterized section 2(b) as a "hog tight, horse high, and bull strong" jurisdictional fence, preventing the Commission from engaging in

[7] *Id.* Similarly, rural ETCs in Arkansas point out, current turmoil in the financial markets "has been attributed to the Federal Reserve Board and market regulators moving to deregulate financial markets too fast . . . . The result is a long term disaster for our nation. . . . The rural ETCs here ask the Commission to act deliberately and cautiously to incrementally implement changes to avoid an unintended economic and communications disaster like that which was unleashed on the financial markets. . . . The middle ground is a slower incremental approach to implement changes gradually over time, especially during a national financial crisis." RATS at 5.

[8] RIITA at 7.

[9] Public Service Tel. et al. at 3 - 4.

[10] *E.g.*, AT&T, Verizon, Sprint, CTIA.

[11] *E.g.*, NARUC at 12-19; DC, DE, PA and NJ commissions (Four State Commissions) at 2; NJ Rate Counsel at 22, Delaware PSC at 2; NASUCA at 8; Penn. PUC at 20.

regulation of intrastate telecommunications matters except in very limited circumstances.[12] In contrast, a voluntary approach to unification of interstate and intrastate access rates, as proposed in comments filed by NECA and other parties,[13] avoids such uncertainty.

The comments also point out numerous problems with the proposed "additional costs" standard.[14] Among the issues raised are the fact the proposed standard improperly fails to include common costs; ignores cross-elastic demand effects; fails to recognize risks associated with irreversible (stranded) investments; doesn't address potential impacts on USF funding; and ignores equity issues associated with loading all network recovery costs on end users and the USF.[15] Commenters also forcefully argue dramatic increases in end user rates associated with this approach would cause rates in rural high-cost areas to rise significantly higher than those in urban areas, contrary to the comparability requirement of section 254(b)(3) of the Act.[16]

---

[12] Citynet at 4; Embarq at 29; Windstream at 19; Nebraska Rural Independent Companies at 9.

[13] NECA at 5; NTCA at 9.

[14] As Windstream (at 23) points out, the Commission "lacks sufficient time to consider any record that could be developed even if parties were afforded more time to comment on the additional costs standard. . . . Windstream suggests that the Commission explore, among other items: whether to establish one unitary rate for all intercarrier compensation; unified rates by carrier, state, or track; the methodology for setting rates and establishing "additional cost" under Section 252(d)(2); and the proper role of state commissions, the Federal-State Separations and Universal Service Joint Boards, and the Federal-State Joint Conference on Advanced Telecommunications Services. . . . Moreover, seeking additional comment will not unduly delay the Commission from further action if warranted and supported, given it will take a matter of years to move beyond even the first step included in the proposals put out for comment by the Commission." *See also*, Citynet at ii; NJ Ratepayer Counsel at 27; MDTC at 20 (Prior to moving forward with any new methodology, the FCC needs to implement or utilize dependable cost studies and data analyses).

[15] NECA at 24-29. *See also*, Iowa Telecommunications Association (ITA) at 15; ITTA at 12; GVNW at 5-6. NASUCA correctly observes, at 11, "[t]he proposed incremental-cost standard mandates that common costs are recovered from all other services and not from intercarrier services. One defense for such a rule is that it is better to recover costs from your own customers than from other carriers. This argument ignores the fact that other carriers are also 'customers.' They are simply wholesale customers rather than retail customers. Wholesale customers use facilities and equipment just like retail customers. There is no economic theory that supports price discrimination in favor of wholesale customers over retail customers, especially with regard to recovery of common costs.… This designation of good and bad customers to charge places an entirely new slant on the saying 'I can get it for you wholesale' because getting it for wholesale [under the FCC's proposal] is getting the service almost free."

[16] *E.g.*, Windstream at 8; GVNW at 9; Texas Statewide Telephone at 5.

Commenters who claim the Act requires reciprocal compensation rates be based only on a new definition of "additional costs" fail to reconcile this approach with prior and inconsistent Commission decisions and policies. When the Commission implemented the 1996 Act, for example, it specifically found that the "additional costs" standard set forth in section 252(d)(2) of the Act permitted rates to be set based on TELRIC studies, including "an allocation of forward-looking common costs."[17] Proponents of the new "additional costs" standard fail to explain how the same statute now prohibits including such costs.[18]

Further, when the Commission implemented TELRIC pricing for interconnection services, it expected the inclusion of common costs would serve as a partial cushion for small ILECs against the Commission's concomitant decision not to permit small ILECs to recover both common costs and a "lost contribution" charge.[19] Imposition of the proposed additional costs standard pulls the pin on this protection.

---

[17] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996;* and *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report & Order and Notice of Proposed Rulemaking, 11 FCC Rcd 15499, at 1059 (1996) (*Local Competition Order*).

[18] Proponents of the new additional costs standard also fail to distinguish other Commission decisions rejecting use of stand-alone costing in other contexts. The Commission's Part 64 cost allocation rules, for example, specifically require carriers to allocate a portion of common costs to regulated services. *See Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activitie*s; and *Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for Nonregulated Activities and to Provide for Transactions between Telephone Companies and Their Affiliates*, Report & Order, 2 FCC Rcd 1298, at ¶¶ 108 *et. seq.* (1987). In considering its original price cap rules, the FCC expressed concern the use of stand-alone costing could result in unreasonably high price caps. *Policy and Rules Concerning Rates for Dominant Carriers*, Notice of Proposed Rulemaking, 2 FCC Rcd 5208, at ¶57 (1987). The Commission has also rejected a proposal to require LECs to prepare stand-alone cost studies for open video services. *Implementation of Section 302 of the Telecommunications Act of 1996*; and *Open Video Systems*, Third Report & Order and Second Order on Reconsideration, 11 FCC Rcd 20227, at ¶213 (1996). While the Commission may change regulatory course over time, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987).

[19] *Local Competition Order* at ¶ 1059.

Additionally, the Commission's prior justification for TELRIC rates included a stated assumption that few small ILECs would even be subject to the TELRIC rules and, thus forego full cost recovery, because of section 251(f)(1)'s rural exemption provision.[20] A significant number of small ILECs have already lost their rural exemptions.[21] Worse, the *Further Notice* proposes new rules intended to make it far more difficult for remaining rural ILECs to retain their exemptions.[22] The combination of rates based on a new and contradictory definition of "additional costs" and loss of the rural exemption exposes small companies to more risk than the FCC or Congress ever intended in 1996.[23] Moreover, as several commenters point out, the *Qwest I* and *II* cases require this type of rate cut to be analyzed for potential impacts on universal service.[24] No such analyses have been done.

---

[20] *Local Competition Order* at ¶ 697. ("We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission ….")

[21] *See, e.g., Petition by GCI Communication Corp. for Termination of the Rural Exemption of and Arbitration with PTI Communications of Alaska, Inc., under 47 U.S.C. §§251 and 252 for the Purpose of Instituting Local Exchange Competit*ion, Order No. 9, U-97-82, *slip op.* (Alaska PUC, June 30, 1999); *Petition of Fairpoint Communications Corp., for Negotiation/Mediation Pursuant to Section 252(a)(2) of the Telecommunications Act of 1996, and for Approval of any Resulting Interconnection Agreement*, Order Requiring Interconnection and Adopting Implementation Plan and Establishing Additional Proceeding, CASE 99-C-1337, *slip op* (N.Y. PSC, June 6, 2000) (terminating Alltel New York's rural exemption); *Midcontinent Communications/Consolidated Telecom Rural Exemption Investigation,* Order Approving Stipulation, Case No. PU-06-400, *slip op.* (N.D. PSC, Nov. 6, 2006).

[22] Not only is the FCC's new proposal to limit the rural exemption inconsistent with 12 years of Commission precedent, but also its purpose of achieving national regulatory uniformity among carriers flies in the face of 74 years of precedent under the 1934 Act, which clearly created and maintained very different rules for small and rural LECs than for larger carriers. The Commission's proposal effectively rewrites national communications law without the help of Congress.

[23] *See, e.g., Local Competition Order* at ¶ 295 ("Section 251(f)(1) grants rural telephone companies an exemption from section 251(c)'s interconnection requirements, under specific circumstances, because Congress recognized that it might be unfair to both the carriers and the subscribers they serve to impose all of section 251's requirements upon rural companies.")

[24] *Qwest Corp. v. FCC,* 258 F.3d 1191 (10th Cir. 2001) ("*Qwest I*"); *Qwest Communications Int'l Inc. v. FCC,* 398 F.3d 1222 (10th Cir. 2005) ("*Qwest II*").

Parties arguing in favor of mandatory uniform near-zero rates generally assert this draconian approach is necessary to deal with rate arbitrage, particularly "access pumping" issues.[25] But as NECA and several other commenters emphasize, the Commission has the ability to deal with "access pumping" issues without upending all existing intercarrier compensation mechanisms.[26] Recently, for example, AT&T and the Rural Independent Competitive Alliance (RICA) agreed on an approach for solving these problems within existing ICC frameworks.[27] Problems associated with "access pumping" arrangements thus hardly support wholesale replacement of existing ICC mechanisms with near-zero rates.[28]

The Commission can, however, take some positive action now. Adoption of reasonable signaling and financial responsibility rules, as proposed in the *Further Notice*, is a widely-supported and logical step. Indeed, commenters from across the spectrum urge the Commission to adopt the proposed new signaling and financial responsibility rules either as part of comprehensive ICC reform or on a stand-alone basis.[29] Even large

[25] *E.g.*, AT&T at 32-34; Qwest at 11-14; Verizon at 67-70.

[26] NECA at 12, 26. *See, e.g.*, NASUCA at 16. *See also* NECA Comments, WC Docket 07-135, Establishing Just and Reasonable Rates for Local Exchange Carriers (Dec. 17, 2007) (suggesting the Commission can rely on a combination of existing statutory tools, such as its authority under section 205 of the Act to investigate the lawfulness of effective tariffs, as well as enhanced certification requirements, to address problems that may arise when demand exceeds amounts on which rates are based.)

[27] *See* Letter from Brian Benison, AT&T and Steve Kraskin, Counsel for the Rural Independent Competitive Alliance, to Marlene H. Dortch, FCC, CC Docket No. 01-92 and WC Docket No. 07-135 (Nov. 25, 2008). Qwest endorsed this approach. *See* Letter from Melissa E. Newman, Qwest, to Marlene H. Dortch, FCC, CC Docket No. 01-92 (Dec. 4, 2008).

[28] Another concern apparently driving calls for immediate comprehensive reform is perceived discrimination between current rates for terminating ISP-bound traffic and other types of traffic. *See, e.g.*, *Further Notice*, Statement of Chairman Martin. But, as the comments make clear, the Commission's *Order on Remand* provides justification both for the Commission's imposition of rate caps on ISP-bound traffic and the rate level chosen. *See, e.g.*, NASUCA at 11-12.

[29] *E.g.*, Wisconsin PSDC 2-3; Ohio PUC at 55-56; California PUC at 17; Michigan PUC at 8; Missouri PUC at 15; NASUCA at 23; Nebraska PUC at 21; Oklahoma Corporation Commission at 13; Wisconsin PUC at 2; Oklahoma Rural Telephone Coalition at 6; ITA at 22; RATS at 4; Texas Statewide Telephone Cooperative at 27; TCA at 12; OPASTCO and WTA at 7. While certain commenters claim "IP-based

service providers, such as AT&T and Verizon, express support for rules placing financial responsibility for unbillable traffic on the intermediate service provider who is actually responsible for placing such traffic on the terminating carrier's network.[30] The Texas Statewide Telephone Cooperative commends the Commission's proposed rule changes to address the "phantom traffic" industry issues. It said "[e]ven though industry participants have proposed somewhat differing solutions to the overall problem, the primary problems are created by originating service providers avoiding payment by intentionally altering or stripping billing information or providing incorrect billing information." Texas Statewide believes "the directives provided by the Commission in its proposed orders go a long way towards putting service providers on notice that inappropriate behaviors like stripping identifying billing information is no longer acceptable."[31]

Many commenters point out, however, the proposals described in the *Further Notice* fail to address one of the most significant problems of rate arbitrage – namely, claims by service providers that their traffic is exempt from access charges because it originates in IP format and is therefore "enhanced" or an "information service." [32] In fact, the *Further Notice's* proposal to leave the "status quo" in place simply perpetuates

---

services" do not require a CPN, emergency workers, law enforcement and Caller ID services do require this information, and most VoIP services today assign NANP telephone numbers to their customers so they can both call and be called. *See e.g.*, Feature Group IP at 4-9.

[30] Verizon at 63-67; AT&T at 35-39. The Commission should not adopt the numerous clarifications requested by Qwest and others as many of these issues either lie outside the scope of the "phantom traffic" problem, such as the regulatory status of transit services, or are self-evident from the Commission's language (*e.g.*, the language in footnote 875 of Appendix A regarding circumstances that trigger the financial responsibility rule).

[31] Texas Statewide Telephone Cooperative at 27.

[32] *E.g.*, Nebraska Rural Independent Companies at 17-18.

existing disputes over compensation obligations for such traffic.[33] As CompTel forcefully stated:

> What is the 'status quo'? The Commission has never issued a ruling on how such traffic should be treated for intercarrier compensation purposes. Indeed, there are currently pending three distinct forbearance petitions and one declaratory ruling petition asking that the Commission clarify whether the ESP exemption applies to IP-PSTN VoIP traffic and whether such traffic is subject to reciprocal compensation or access charges. All four of the Petitions complain about the growing number of disputes among carriers regarding the appropriate compensation to be paid for terminating IP-PSTN VoIP calls. Does the Commission intend to maintain the "status quo" of regulatory uncertainty or does it mean something else? Without knowing what the Commission means or intends, it is difficult to comment on the proposal.[34]

Virtually all commenters oppose the Commission's proposed declaration that IP/PSTN services qualify as "information services" simply by virtue of the fact that IP protocol is involved at some point in the chain.[35] The ITA, for example, "is deeply concerned that the proposed identification of IP/PSTN traffic as information services traffic would incent those carriers who pay terminating compensation, such as IXCs and wireless carriers, to hasten network changes to avoid the payment of terminating compensation or to at least allege that they had made such changes to avoid those payments."[36] NASUCA succinctly and accurately explains in this regard that the type of "protocol conversions" described in the Further Notice

---

[33] NECA at 11.

[34] Comptel at 2-3.

[35] *See e.g.,* Public Service Telephone, et al., at 11; Texas Statewide Telephone Cooperative at 20; TCA at 12; Nebraska Rural Independent Companies at 16-17; D&E Comm. at 3; Minnesota Independent Coalition at 6; USTelecom at 8; NTCA at 6; ITA at 3; ITTA at 15; Missouri Small Telephone Company Group at 9; CenturyTel at 26; Ohio PUC at 47-48; California PUC at 4; MDTC at 12-13; Nebraska PSC at 7-12; Broadview at 9, 13. Even commenters who support the Commission's proposal on policy grounds (*e.g.*, CTIA at 23) fail to explain how interconnected VoIP services, which primarily enable users to make point-to-point local and long distance voice-in/voice-out calls, could properly be considered "enhanced" or "information" services.

[36] ITA at 3

> are part and parcel of any telecommunications network. Within most telephone calls, analog electronic waves are converted to digital signals. In some cases, the digital electronic signals are converted to light signals and back again into electronic signals. These conversions do not change telecommunications services into information services. Similarly, the protocol conversion to Internet Protocol does not create an information service."[37]

Comptel quotes Verizon who "itself has explained that the voice service it provides over its IP-based FiOS fiber network is the same as the voice service provided over its circuit-switched network, and that the choice of technology used is an internal engineering decision:"[38]

> Verizon denies that it offers a product called "FiOS telephone service." FiOS is a brand name used to describe the high speed Internet service and video service Verizon offers over its fiber optic network – not POTS service . . . . Verizon' s regulated voice service is the same regardless of the medium over which it is provided, even if the technical requirements for the service to work over that medium happen to be different.[39]

The Public Utilities Commission of Ohio observes the proposed declaration creates a result that is "contrary to the FCC's stated goals for reformed intercarrier compensation, competitive neutrality and reducing regulatory arbitrage. It is difficult to

[37] NASUCA at 9. *See also* CompTel at 2 (FCC classification proposal "is both technologically unsound and legally unsupportable. Packet-switched networks and TDM networks are transmission technologies. The Commission's classification is based not on the nature of the service provided to the end user, but on the network technologies used to deliver a voice call. The internetworking conversions used to terminate a call that originates on a circuit-switched network and terminates on an IP network, and vice versa, are not net protocol conversions to the end user and are specifically excepted from the definition of information service set forth in the Act.")

[38] Comptel at 13.

[39] *Id., quoting Commission's Inquiry Into Verizon Maryland's Provision of Local Exchange Telephone Service Over Fiber Optic Facilities,* Case No. 9123, Verizon Maryland Inc.'s Response to the Request of the Office of People's Counsel for an Investigation Into Verizon Maryland Inc.'s Provision of Local Exchange Service over Fiber Optic Facilities (Maryland PSC, Aug. 31, 2007), at ¶¶ 1, 7.

imagine an outcome less competitively neutral, or more fraught with regulatory arbitrage, than the outcome that would result from the FCC's proposal in this regard." [40]

In any case, the Commission needs to resolve the status of IP/PSTN traffic for intercarrier compensation purposes. As Broadview points out, such traffic is the "elephant in the room" on the topic of differential call termination rates."[41] Even if the Commission somehow were to find that IP/PSTN services automatically qualify as "information services" based solely on technology used, without consideration of the actual nature of the services offered, it should confirm, as NECA, AT&T, NTCA, ITTA, Broadview, Comcast, Qwest, Windstream, Time Warner, and many other commenters urge, *calls made using such technology are subject to the same intercarrier compensation obligations as any other local or long-distance calls.*[42] This step, in combination with others described above, will resolve most current problems with existing ICC mechanisms and enable the Commission to proceed with comprehensive reform in a reasonable and measured fashion.

[40] Ohio PUC at 48. Similarly, the Massachusetts DTC explains that it opposes any action to classify fixed VoIP as an information service for two primary reasons: "(1) proposed classification would preempt state regulation of nearly all residential telecommunications services in Massachusetts without any other regulation to fill the void and (2) MDTC will have no ability to ensure that residential telecommunications customers continue to receive the benefit of essential consumer protections." According to the Massachusetts DTC (at 11), fixed VoIP telephone service is "now offered by one or more cable companies in 288 Massachusetts communities, representing nearly 97% of the state's population." It urges the Commission "fully consider the consequences that would result if fixed VoIP is classified as an information service and the resulting deregulation of the vast majority of residential telecommunications services" in the Commonwealth.

[41] Broadview, et al. at 9.

[42] NECA at 11-12; AT&T at 5-6, 28-30; NTCA at 14-16; ITTA at 16; Broadview at 13; Comcast at 11; Qwest at 14; Windstream at 26; Time Warner at 6.

III. THE COMMISSION SHOULD, AT A MINIMUM, REFRAIN FROM APPLYING SECTION 251(b)(5) RECIPROCAL COMPENSATION STRUCTURES TO RoR COMPANIES UNTIL SPECIFIC IMPLEMENTATION IMPACTS ARE EVALUATED IN A FURTHER PROCEEDING.

As explained above, NECA strongly urges the Commission to take measured steps towards ICC reform. An FCC order establishing a voluntary mechanism for unifying interstate and intrastate access charges, together with new signaling rules, measures dealing with financial responsibility for unlabeled traffic, and clarification that IP/PSTN traffic should be treated like all other traffic for intercarrier compensation purposes, would represent substantial and legally-sustainable progress towards ICC reform.

A number of commenters express practical concerns about the Commission's proposal to fit all telecommunications traffic into the reciprocal compensation structure of section 251(b)(5).[43] NTCA and the Nebraska Rural Independent Companies, among others, point out the Act's reciprocal compensation structures are premised on two carriers collaborating to exchange local traffic, and do not address interconnection with third carriers, such as interexchange carriers (IXCs), to originate or terminate toll calls.[44] These commenters note the Commission's proposal fails to address how the structural, architectural, and financial obligations underlying the current access regime will transition to a reciprocal compensation regime. NTCA questions, for example, whether

[43] *E.g.*, Broadview at 28 (reciprocal compensation arrangements are intended to provide for the "mutual and reciprocal recovery *by each carrier* of costs associated with the transport and termination *on each carrier's network facilities* of calls that originate on the network facilities of the other carrier. In contrast with the arrangements contemplated in Section 251(b)(5), there is nothing reciprocal about the access charge regime. Integra (at 15) also points out "[a]pplying reciprocal compensation concepts, and rates, to the termination of *long distance* traffic carried by *interexchange* carriers is inconsistent with the purpose of the statute and flatly contravenes its language." *See also* Citynet at 3-4.

[44] NTCA at 19-23; Nebraska Rural Independent Companies at 9-10.

an IXC will be "required to construct its own facilities to reach the customer or can the IXC continue to purchase access from the incumbent for this service?"[45]

Questions also arise as to whether ILECs will retain the obligation to provide dialing parity, the effects of the Commission's proposal on existing jointly-provided access arrangements, how originating LECs will receive compensation for "800" toll-free traffic, whether the Commission's proposal will inadvertently permit interexchange carriers "free access" to LEC networks, and the difficulties small rural carriers will have negotiating interconnection agreements with all the carriers that send them traffic.[46]

NTCA and the Nebraska Rural Independent Companies also point out that because the Commission has failed to describe which carrier should pay the terminating reciprocal compensation during the transition from the access regime, the Commission will establish "plausible deniability" among carriers as traffic is transitioned from access into reciprocal compensation.[47] For example, does this new structure transform IXCs into transit providers who now expect originating carriers to pay reciprocal compensation for their toll traffic? The Commission must also answer a number of other questions related to the role of transit providers, such as the circumstances under which long distance carriers are to be considered transit providers, whether transit providers have default "edges," and what legal duties and regulatory obligations apply to transit providers.[48]

---

[45] NTCA at 21.

[46] *Id.*

[47] *Id.* at 22.

[48] Nebraska Rural Independent Companies at 15; Qwest at 27-28.

NECA is particularly concerned about the practical impacts this approach could have on the 1200+ rural carriers that participate in its tariffs and access charge pools. These companies depend heavily on existing intercarrier compensation revenues and jointly-provided access interconnection arrangements to maintain service to customers.[49] Therefore, should the Commission wish to establish a framework for more comprehensive reform under section 251(b)(5) of the Act, NECA suggests it refrain from applying such rules to RoR carriers until implementation issues can be resolved in a further proceeding designed specifically to consider the feasibility, as well as desirability, of consolidating existing RoR access arrangements for interexchange traffic with reciprocal compensation arrangements for local traffic.[50]

As part of this further inquiry, NECA also strongly suggests the Commission consider ways to permit small RoR carriers to continue using voluntary tariff and pooling arrangements under new ICC mechanisms.[51] Rural companies have consistently expressed concerns about their ability to negotiate fair and reasonable interconnection agreements with the hundreds of carriers sending them traffic. Many simply do not have the resources to negotiate, arbitrate, and seek enforcement of so many agreements.[52]

---

[49] *E.g.*, Missouri Small Telephone Company Group at 5-8; ITA at 14-15; RIITA at 5-6.

[50] Although the *Further Notice* asserts "no changes to the separations rules are at issue" in this proceeding, *Further Notice*, Appendix A at ¶ 304, several commenters assert that adoption of the proposals set forth in the *Further Notice* would in fact require referral to a Joint Board under section 410(c) of the Act. *E.g.*, ITTA at 9; Frontier at 5; CenturyTel at 12; Embarq at 31;Windstream, at 4; NTCA at 44. Further, as NTCA points out, the Regulatory Flexibility Act (5 U.S.C. § 601 et seq.) requires the Commission to consider alternative rules that will reduce the economic impact on small entities. NTCA at 43. The record in this proceeding demonstrates extreme potential adverse impacts on small rural telephone companies and their customers. *See, e.g.*, Letter from David C. Duncan, Iowa Telecommunications Association, to Marlene H. Dortch, FCC, WC Docket No. 05-337 (Dec. 9, 2008). These issues (*i.e.*, separations changes, RFA questions) are among many requiring careful consideration before small carriers' existing ICC arrangements can be replaced by section 251(b)(5) mechanisms.

[51] NECA at 39.

[52] NECA at 39. *See also* Letter from Joe Douglas, NECA to Marlene H. Dortch, FCC, CC Docket No. 01-92 (Mar. 27, 2008), presentation at 5-8.

Small companies also often find themselves without the leverage to negotiate fair interconnection agreements with larger carriers, who typically refuse to consider reasonable modifications to standard agreements. As the Rural Iowa Independent Telephone Association (RIITA) stated "[c]ompanies with 1000 access lines have no bargaining power to negotiate with large interexchange carriers, RBOCs, mid-size carriers and video content providers. . . . Wireless carriers have outright refused to compensate rural carriers for terminating traffic. Many large companies have engaged in oppressive litigation in various forums, using abusive discovery requests and other expensive litigation techniques to drive up legal costs."[53]

Tariff arrangements appear to provide the most reasonable and efficient solution for these problems.[54] As NTCA explains, "[t]ariffed rate setting for intercarrier compensation rates in lieu of negotiated commercial agreements between small, rural ROR carriers and large, vertically integrated interexchange and wireless carriers is a reasonable approach, given the disparity in size between the negotiating parties and the efficiencies created through pooled rate setting."[55]

At a minimum, the Commission should consider using federal tariffs as the mechanism for implementing default intercarrier compensation arrangements as this will

[53] RIITA at 3. *See also* RATS at 4 ("small ROR companies "do not have the resources to negotiate interconnection agreements with large carriers. The Commission should study the possibility of establishing tariff-based structures for intercarrier compensation related to section 251 / 252 interconnection agreements.")

[54] *See, e.g.,* Letter from Melissa Newman, Qwest, to Marlene H. Dortch, FCC, CC Docket No. 01-92 (Oct. 27, 2008), at 7.

[55] NTCA at 7, n.7. Several commenters also explain the benefits of maintaining voluntary pooling arrangements under a reformed ICC system. *See, e.g.*, NTCA at 40; OPASTCO and WTA at A-3; Texas Statewide Telephone Coop at 17; TCA at 9. *See also* Sandwich Isles at 8 (existing interstate tariff and pooling mechanisms provide a "much needed oversight resource that adds stability, a level of cost recovery assurance, and integrity to the costing process for SIC and other rate-of-return incumbent local exchange carriers.")

minimize transaction costs.[56] In addition, tariffs provide for substantial flexibility in setting rates that reflect costs and can accommodate the needs of similarly-situated groups of customers and carriers.[57]

Finally, in the event the Commission does determine RoR carriers should convert existing access arrangements to reciprocal compensation structures under section 251(b)(5), it should refrain from establishing specific implementation dates until specific rules governing new compensation arrangements, including interconnection rules and alternative cost recovery mechanisms, become final. NECA's comments described the importance of reviewing specific rule language based on actual experience with access reform implemented in the Commission's *MAG* proceeding.[58] Several commenters provided similar suggestions for implementation of further access reform. NTCA, for example, emphasized the need for the Commission to adopt an alternative high-cost USF cost recovery mechanism prior to requiring access reductions.[59] In NTCA's view, carriers should not be expected to implement intrastate rate reductions until specific rules governing alternative cost recovery are in place and considered final.[60] Promulgation of specific rules in advance of actual implementation may help resolve concerns identified

[56] NASUCA, et al. at 16.

[57] NECA's comments explained how rate banding techniques used in its access tariff permit groups of ILECs with similar cost characteristics to charge rates reflecting those costs. NECA at 40, n. 101. NECA also agrees with NTCA that in the event the Commission elects to cap interstate access rates, the cap should reflect the composite pool average switched access rate level. *See* NTCA at 9, n. 9. Under this approach NECA would continue to assign pool study areas to rate bands in a capped environment as it does currently.

[58] NECA at 38. (*I.e.*, NECA proposed that dates for scheduled rate reductions be based on the date actual rules become final (*e.g.*, "one year from the effective date of the Order, or six months from the date rules incorporating ICC reform measures become final, whichever occurs later.") *Id.*

[59] *See* NTCA at 9-12. *See also*, OPASTO and WTA at 21-22.

[60] *Id.* at 30.

by numerous commenters regarding the "workability" of ICC reform mechanisms under consideration in this proceeding.[61]

IV. UNIVERSAL SERVICE REFORM SHOULD SUPPORT RATHER THAN IMPEDE BROADBAND DEPLOYMENT EFFORTS.

NECA's comments expressed concern with proposals in the *Further Notice* that appear to prevent, rather than promote, the Commission's broadband deployment goals for rural areas.[62] Numerous commenters explain, for example, that reverse auctions are unworkable as a practical matter and are likely to embroil the Commission, carriers and state regulators in unending legal and administrative disputes.[63] Some commenters suggest the prospect of unachievable broadband commitments and reverse auctions may cause carriers simply to walk away from serving rural areas.[64] Many commenters also explain how the proposals would undermine rural carriers' efforts to acquire funding to expand broadband networks in rural areas.[65]

Many commenters recognize the inherent danger in applying study area-specific caps or freezes on Universal Service support.[66] The Oklahoma Corporation Commission

---

[61] *See supra* note 3.

[62] NECA at 19.

[63] *E.g.*, Public Service Telephone at 13; Texas Statewide Telephone Cooperative at 10; TCA at 6; OPASTCO and WTA at 24; NTCA at 30; ITTA at 24; Embarq at 12; Missouri PSC at 11; NASUCA at 30; Oklahoma CC at 10; Nebraska PUC at 12; Wisconsin PUC at 5.

[64] NASUCA cautions the Commission that while the vast majority of carriers -- both rural and non-rural -- have funding at risk under the *Further Notice* proposals, the key question is whether that risk is sufficient to produce certification and compliance with the build-out requirements. Similarly, NARUC suggests that the Commission's proposed approach to broadband build-out commitments represents a commendable objective but the mandates imposed by the Order are not reasonable. In NARUC's view, the Commission's proposal would require "ubiquitous broadband deployment in some of the most costly areas of the country without consideration of costs, efficiencies or potential customer subscription rates." NARUC at 9.

[65] *E.g.*, Telecom Investors at 3. *See* Letter from Eric Einhorm, Windstream, to Marlene H. Dortch, FCC, CC Docket No. 01-92 (Dec. 4, 2008), presentation at 1.

[66] *E.g.*, Michigan PSC at 3-4; Wisconsin PSC at 7-8; Oklahoma CC at 9-10; RICA at 15; NASUCA at 6; Oklahoma Rural Telephone Coalition at 1; Public Service Telephone, et al. at 13; TCA at 4, 8; NTCA at

states in this regard the USF cap "is a blunt instrument and does not properly account for situations where there is genuine need for additional USF support."[67] The Wisconsin PSC "disputes the FNPRM's conclusion that capping support will provide specific, predictable, and sufficient support to preserve and advance universal service."[68] The California PSC also "does not support a permanent across-the-board cap on federal high-cost support because such a step would not appropriately target the subsidies to the actual high-cost areas."[69]

NECA explained in this regard how such proposals would eliminate RoR carriers' ability to recover investments already made, or to earn at authorized levels going forward.[70] In effect, the proposed study-area specific caps would end RoR regulation for the 1200+ carriers currently operating under this system – a consequence not even mentioned, let alone discussed, in the *Further Notice.*[71] The Commission cannot impose study area-specific caps or freezes on universal service support without first considering the effect on RoR regulation.[72] As demonstrated in NECA's comments, rural ILECs'

29; ITA at 7-8; Missouri Small Telephone Company Group at 1-2; RATS at 4; Warinner, Gesinger, & Associates at 1.

[67] Oklahoma CC at 9.

[68] Wisconsin at 7-8.

[69] *See also* NTCA at 29 (the Commission "should not impose additional USF caps (and/or support freezes) that unlawfully foreclose all opportunities for rate-of-return carriers to earn the authorized rate of return, or shift excessive costs to rural consumers in violation of the comparable rate requirement of Section 254 of the Act."); Missouri Small Telephone Company Group at 3 (a "cap or freeze contradicts the purpose of the USF to ensure comparable services at reasonable prices in rural areas, as well as the FCC's proposed emphasis on building and providing broadband service to high-cost rural areas.").

[70] NECA at 20.

[71] NECA at 27. *See e.g.,* NTCA at 29; Missouri Small Telephone Company Group at 1-2;

[72] NASUCA observes that without additional universal service funding, rural ILECs will not be able to finance such projects. Therefore, instead of enhancing the broadband capability of telephone networks, the Chairman's proposals will freeze in place current broadband services. NASUCA at 29.

high cost funding trends have been stable.[73] Concerns about increases in USF funding levels do not, therefore, warrant effective elimination of RoR regulation, as would occur if the proposed study area-specific caps or freezes are adopted.

NECA agrees with commenters who support replacement of the current "identical support" rule with a USF mechanism based on costs.[74] TCA, for example, said "[u]nder the guise of competitive neutrality, the identical support rule has provided wireless carriers with billions of dollars from the USF, purportedly to expand wireless coverage into high-cost unserved areas. While a few smaller wireless carriers have actually used universal service funds for this purpose – large national wireless carriers have received the vast majority of these funds and frequently "use" them for little more than profitability enhancement."[75]

As several commenters recognize, however, the details of a replacement system require further study.[76] Implementation of new programs targeted to achieve specific public interest goals (for example, as the *Further Notice* suggests, deployment of advanced mobile wireless services in high-cost and rural areas)[77] should be studied in a separate proceeding. Should the Commission adopt its proposal to phase-out existing CETC support mechanisms over a five-year period, funding for such new programs could be phased-in on the same schedule.[78]

---

[73] NECA at 24 and Appendix.

[74] Missouri PSC at 9; Oklahoma Corporation Commission at 5-6; Nebraska PSC at 2, 5; NASUCA at 38; Oklahoma Rural Telephone Coalition at 3; TCA at 4; OPASTCO and WTA at 29; NTCA at 23; ITA at 13; ITTA at 21; Missouri Small Telephone Company Group at 4; GVNW at 11.

[75] TCA at 4.

[76] *E.g.*, Verizon at 28-30; Massachusetts DTC at 21; NASUCA at 6.

[77] *Further Notice*, Appendix C, ¶ 339.

[78] Verizon at 28-31; AT&T at 43-44.

NECA explained how universal availability of broadband Internet access service may require new or revised universal service mechanisms, *e.g.* to help recover the high costs of obtaining transport to the Internet backbone for rural areas.[79] Other commenters echo these concerns.[80] The Commission's focus for USF reform should be on adopting measures to support expansion of broadband services to all consumers across America, while at the same time ensuring the most efficient use of USF funding.

The proposals set forth in the *Further Notice* appear largely focused on limiting (or eliminating) current USF mechanisms, however. NECA continues to believe this is exactly the wrong approach – the Commission has not adequately examined what it will take to deploy broadband ubiquitously in rural areas, and therefore is not in a position to determine how best to meet section 254's "sufficiency" requirement. Rather than blindly impose study area-specific caps or freezes on universal service support, NECA continues to believe the Commission should examine in a separate proceeding what measures will actually be effective in securing universal broadband network deployment and access to the multi-service networks currently being built by rural RoR carriers.

With respect to reform of USF contribution mechanisms, NECA suggested that, regardless of whether the Commission adopts a numbers or connections-based mechanism, it should expand the contribution base as broadly as possible, specifically to include broadband services.[81] Universal access to broadband services should logically be supported by contributions from broadband service providers. NECA agrees with NTCA that "[s]ustaining a robust USF based on contributions from only a narrow class of

[79] NECA at 15.

[80] *E.g.*, NTCA at 38-39.

[81] NECA at 41. *See also* California PUC at 12.

carriers and services is impossible. If USF contributions are limited to a subset of services, the pricing differential between services that support the network and those that receive a "free ride" will cause services to migrate away from the services that support the network."[82] As demand for telecommunications services migrates to broadband services, the Commission should assure Universal Service funding keeps pace by including all broadband connections in the contribution base regardless of technology used (*e.g.*, DSL, cable modem) or regulatory status (Title I or Title II).

Finally, NECA agrees with AT&T and others that a new USF contribution mechanism should apply consistently across all programs, including the Telecommunications Relay Service (TRS), local number portability, and North American Numbering Plan Administration funds.[83] As AT&T notes, requiring contributors to maintain dual contribution methodologies (numbers and connections for USF; revenues for other funds) would serve no policy goal and would unnecessarily complicate providers' compliance efforts.[84]

V. CONCLUSION

The record in this proceeding strongly supports reasonable and measured steps towards ICC and USF reform. Consistent with the "growing consensus" approach described in the *Joint Statement* of Commissioners Copps, Adelstein, Tate and McDowell, the Commission should adopt rules establishing voluntary means for carriers

[82] NTCA at 27.

[83] NECA at 43.

[84] AT&T at 49, n. 77, *citing* Report and Order, *1998 Biennial Regulatory Review—Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms,* CC Docket No. 98-171, FCC 99-175, 1999 WL 492955, ¶ 65 (rel. Jul. 14, 1999).

to unify their interstate and intrastate access rates, on a reasonable timetable, with availability of adequate replacement funding. This will avoid legal issues associated with preemption of state ratemaking authority, and the Commission will take an important first step towards legally-sustainable ICC reform.

The Commission should also adopt reasonable rules governing call signaling and financial responsibility for unidentified traffic, and confirm interconnected VoIP services are subject to the same ICC obligations as other services using the PSTN to originate and terminate local and long distance calls.

The Commission should not attempt, however, to resolve all ICC and USF reform issues at once, as this will only leave the Commission and the industry in a continuing state of legal and regulatory uncertainty and dispute. Should the Commission insist on establishing an overall framework for ICC reform under section 251(b)(5), however, it should refrain from applying such structures to RoR carriers until specific implementation rules can be worked out in a separate proceeding. This step is necessary to assure continuation of existing services and to avoid both financial and technical disruptions to rural carriers and customers.

Finally, the Commission should avoid USF reform measures that impede rather than encourage broadband deployment. In particular, the Commission should not impose unrealistic broadband build-out commitments or unworkable reverse auctions mechanisms on rural RoR carriers, nor should it impose study area-specific caps or

freezes on high cost funding. It should instead focus its efforts on adapting existing Universal Service mechanisms to support the deployment and accessibility of modern broadband-capable networks.

Respectfully submitted,

NATIONAL EXCHANGE
CARRIER ASSOCIATION, Inc.

December 22, 2008

By: 

Richard A. Askoff
Its Attorney
80 South Jefferson Road
Whippany, NJ 07981
(973) 884-8000

CERTIFICATE OF SERVICE

I hereby certify that a copy of NECA's Reply Comments was served this 22nd day of December 2008, by electronic filing and e-mail to the persons listed below.

By: /s/ Shawn O'Brien
Shawn O'Brien

The following parties were served:

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC. 20554
(via ECFS)

Best Copy and Printing, Inc.
Room CY-B402
445 12th Street, SW
Washington, DC 20554
fcc@bcpiweb.com

Victoria Goldberg
Federal Communications Commission
445 12th Street, SW
Washington, DC. 20554
Victoria.Goldberg@fcc.gov

Jennifer McKee
Federal Communications Commission
445 12th Street, SW
Washington, DC. 20554
Jennifer.McKee@fcc.gov

Marilyn Jones
Federal Communications Commission
445 12th Street, SW
Washington, DC. 20554
Marilyn.Jones@fcc.gov